United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7167

To be argued by
JOAN P. SCANNELL

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MILDRED POPKIN, :

Plaintiff, :

-against- :

NEW YORK STATE HEALTH AND MENTAL HYGIENE FACILITIES IMPROVEMENT, :

Defendant. :

----------X

BRIEF FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (MacMahon, D.J.), dated March 4, 1976, dismissing plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Questions Presented

1. Is the New York State Health and Mental Hygiene Facilities Improvement Corporation a "political subdivision" within the meaning of the pre-1972 Title VII Exemption of the

Civil Rights Act?

2. Is the 1972 Amendment to Title VII, which eliminated the "political subdivision" exemption, retroactive?

Statement of Facts

The defendant New York State Health and Mental Hygiene Facilities Improvement Corporation (hereinafter NYSH & MHFIC) is a "corporate government agency constituting of a public benefit corporation." McKinney's Unconsolidated Laws, Title 13-A, § 4404. The defendant is created by statute and its powers and duties are defined by statute (§ 4401-4417). The purpose of the defendant public corporation is to "....receive and administer monies for the construction and improvement of mental hygiene facilities and provide such facilities in accordance with the foreseeable needs for the care, maintenance and treatment of the mentally defective" (§ 4402). The defendant is administered by five directors two of whom are the Commissioner of Health and Commissioner of Mental Hygiene and three of whom can be removed by the Governor. The chairman of the corporation, who is the chief executive officer, is also appointed by the Governor (§ 4404). The financial matters of the corporation are

prescribed by statute (§ 4409, 4410); and an annual budget in addition to an annual report is submitted to the Governor or Director of the Budget. All money and property of the defendant is exempt from taxation (§ 4411).

In the case at bar, the plaintiff Mildred Popkin claims that the defendant discriminated against her on the basis of sex. In January 1968, plaintiff was hired by defendant as an Associate Development Administrator. On or about November 15, 1970 plaintiff, (as well as two male architects) was informed that her services would be terminated as of January 15, 1971 because of a diminished work load. Plaintiff instituted this action in the United States District Court under the Equal Employment Opportunities Act, Title VII of the Civil Rights Act, 42 USCA §§ 2000e et seq., alleging that this termination was an act of discrimination based on her sex and, as such, was prohibited by Title VII. Plaintiff requests $54,490.93 in damages from loss of wages, $100,000 in punitive damages and $25,000 for legal fees.

The District Court, in dismissing plaintiff's complaint, found that the defendant was a "political subdivision" within the meaning of Title VII. The Court based

its decision on the fact that the defendant was created by the State, with a governmental function, and it is accountable to the Governor and other state officials. The Court further found that the 1972 Amendment to Title VII is not retroactive.

POINT I

THE NYSH & MHFIC IS A "POLITICAL SUBDIVISION" WITHIN THE MEANING OF THE PRE-1972 TITLE VII EXEMPTION OF THE CIVIL RIGHTS ACT.

The decision of the District Court dismissing plaintiff's complaint was clearly proper since the acts complained of occurred prior to 1972, and the defendant NYSH & MHFIC is a "political subdivision" within the meaning of the pre 1972 exemption of Title VII of the Civil Rights Act. Thus, in the case at bar, the defendant is exempt from suit under the Act.

Prior to March 24, 1972 governmental agencies were expressly exempted from coverage under Title VII by reason of the Act's definition of "employer" as

> "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or

> more calendar weeks in the cu nt or preceding calendar year, and any agent of such person, but such term does not include (1) a State or political subdivision thereof..." 42 U.S.C. § 2000e(b) (emphasis added.)

While no specific test had been enunciated for determining when a state agency is a political subdivision within the meaning of Title VII, the standards developed by the National Labor Relations Board have been consistently followed. The leading NLRB case of NLRB v. Randolph Electric Corporation, 343 F 2d 60 (4th Cir. 1965), stated that for political subdivision status, the Board required a showing that the agency is created directly by the State or administered by state-appointed or publicly elected officials.

This test was further refined by the Supreme Court in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600-605 (1970), which held that "[t]he Board test is not whether the entity is administered by 'State appointed or elected officials'. Rather, alternative (2) of the test is whether the entity is 'administered by individuals who are responsible to public officials or to the general electorate . . . '" (Emphasis in original).

The defendants in the above case, the Commissioners of the Utility, were found to meet alternative (2) of that test, being appointed by an elected County Judge and being subject to removal preceedings applicable to all public officials.

The NLRB test was applied to a case arising under Title VII in EEOC decision No. 71-405, November 5, 1970 (CCH Employment Practices § 6182). This case involved a multistate educational agency which claimed exemption from Title VII as a "political subdivision."

In its decision, the EEOC adopted the NLRB test and referred to the case of Randolph Electric, supra, as mandating consideration of "the relationship which the employer has with the particular state and whether it is performing a service for the exclusive benefit of that state."

The Commission held that the agency was a "political subdivision" within the meaning of the Title VII exemption, since it was created directly by the contracting states, existed solely for their mutual benefit, and performed a function traditionally performed and administered by the state governments.

The District Court's finding below that the defendant was a political subdivision was clearly proper and in compliance with the above standards. The defendant was created directly by the State, through passage of the Facilities Development Corporation Act in 1968. Its powers and duties are clearly defined by state law. Its five directors are the Commissioner of Health, the Commissioner of Mental Hygiene, and three persons appointed by the Governor with the advice and consent of the Senate, all five of whom are subject to removal by the Governor. Its services are for the exclusive benefit of the State, as its descriptive title of "public benefit corporation" implies. It performs functions which would otherwise be performed by, inter alia, the State departments of law, health, mental hygiene and corrections, and by agencies such as the office of drug abuse services, narcotic addiction control commission, housing finance agency, medical care facilities finance agency, division of the budget and office of general services, all of which are legislatively mandated to cooperate with and assist it. The defendant's financial matters are limited by statute and an annual budget, as well as a report, must be submitted to the Governor or Director of the Budget. Moreover,

all money and property of the defendant is exempt from taxation (McKinney's Unconsolidated Laws Title 13-A 66 (4401, 4417).

Thus, it is clear that the defendant is a "political subdivision" within the meaning of the Act.

In the case at bar, plaintiff has founded her whole argument on the proposition that since the defendant is termed by the State as a "public benefit corporation", it cannot be a "political subdivision" for the purposes of the Title VII exemption of the City Rights Act. Plaintiff claims that state rather than federal law applied in determining what is or is not a "political subdivision" under the Act. Therefore, plaintiff concludes, if the State does not specifically term a state agency a "political subdivision" it cannot be exempt under the Act. This claim is spurious and not supported by a single authority. Rather, the cases directly contradict plaintiff's proposition.

It is clear that federal and not state law should control in determining what is or is not exempt from a federal statute. Contrary to plaintiff's contention, the Federal Courts have held agencies to be political subdivisions under

Title VII despite their state designation as a "public benefit corporation."

In Surowitz v. New York City Employee's Retirement System, 276 F. Supp. 369, 371-372 (SDNY 1974), the defendant New York City Employees Retirement System was designated by local law as a corporation. The Court, in finding the defendant exempt as a political subdivision, stated that the local designation of a corporation did ". . . not serve to constitute that body as a 'person' within the meaning of § 1983".

The New York City Transit Authority. which is defined by Statute as a "public benefit corporation", was also found to lie within the exempt "political subdivision" status under Title VII. See Sams v. New York State Board of Parole, 352 F. Supp. 296-298-299 (SDNY 1972).

Likewise, this Court has recently held in Monell v. Department of Social Services, _____F. 2d_____, (Slip op. p. 2409 Doc. No. 75-7333 Dec. 19, 1975), that so-called independent agencies of the State or City are not automatically deemed persons under the Civil Rights Act. Rather, it looked to the same criteria as were used in the leading NLRB

cases. In finding the defendant, Board of Education, to be a political subdivision despite its independent character, this Court noted that it performed a vital governmental function; and while it had the right to determine how funds were spent, it had no say in what its final appropriations would be. The Court further noted that the Board must prepare an annual budget to be submitted to the Mayor and that the Board took title to real property in the name of the City. Similarly, the defendant in the case at bar, performs a vital governmental function. It also must submit an annual budget to the Governor or Director of Budget (§ 4411). Its finances are strictly controlled by statute (§ 4409) and the acquisition of real property must be approved by the Attorney General (§ 4409(6)C).

Thus, in view of the reasoning of this Court, and the cases which have ific ally held public benefit corporations to be political subdivision within the Act, it is clear that the defendant herein is exempt under Title VII.

POINT II

THE 1972 AMENDMENT TO TITLE VII, WHICH ELIMINATED THE "POLITICAL SUBDIVISION" EXEMPTION IS NOT RETROACTIVE.

The authorities are clear that the 1972 Amendment to Title VII, which eliminated the "political subdivision" exemption, is not to be applied retroactively. This Court in Monell v. Department of Social Services, supra, unequivocally ruled that the same principle upon which it held that the Amendment was not retroactive as applied to educational institutions, equally applied to governmental agencies and political subdivisions.

Thus, in following its earlier reasoning in Weise v. Syracuse University, 522 F. 2d 397, 410-11 (2d Cir. 1975), this Court stated in Monell: "We held that it was not retroactive for it was a 'statute creating new rights when none had previously existed'....We see no valid ground for distinguishing the sex discrimination claim in Weise from similar claims against the city or Board of Education based upon a retroactive application of Title VII." (Monell slip op. at 2413-14).

Finally, the Court distinguished the case of Brown v. General Services Administration, 507 F. 2d 1300 (2d Cir. 1974), cert. granted 421 U.S. 987 (1975), noting that in Brown the substantive right already existed and only an additional remedy was being provided.

In the case at bar, the acts of which plaintiff complains occurred prior to the effective date of the 1972 amendment. Thus it is clear, and uncontradicted by the plaintiff, that the amendment is not retroactive as applied to the defendant. Therefore, the District Court's dismissal based on defendant's "political subdivision" exemption was in all respects proper.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
July 19, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P SCANNELL, being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for ~~plaintiff~~ defendants herein. On the 19 day of July, 1976, she served the annexed upon the following named person :

Milton Kraus
60 East 42St.
NY NY 10017

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Joan P Scannell

Sworn to before me this
19 day of July, 1976

Dep. Kenneth L McKay
Assistant Attorney General
of the State of New York